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No. 98-237

In The

Supreme Court of the United States

October Term, 1998

ROBERTSON, STEPHENS & COMPANY,

Petitioner,

vs.

TONYJA DUFFIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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Petitioner Robertson, Stephens & Company ("Robertson, Stephens") respectfully submits that respondent Tonyja Duffield ("Duffield") has not raised in her opposition brief a single valid reason for denying the writ of *certiorari*. Duffield cannot deny the importance of the question raised in the petition: whether employers and individual employees may enter into enforceable agreements to arbitrate Title VII and related state statutory claims as a condition of employment. Duffield does not dispute that a square conflict among the circuits exists, but merely quibbles as to the extent of the conflict. She also speculates that the question presented in this petition may be answered by the Court's decision in the pending case of *Wright v. Universal Maritime Services Corp.*, No. 97-889 (argued Oct. 7, 1998), which involves arbitration of a statutory discrimination claim under a collective bargaining agreement not governed by the Federal Arbitration Act ("FAA"). As the briefs and recent oral argument in that case reveal, however, the *Wright* case does not provide the proper opportunity for the Court to decide whether, under the FAA, Section 118 of the Civil Rights Act of 1991, which encourages arbitration, actually evinces congressional intent to preclude arbitration of statutory discrimination claims pursuant to individual agreements entered into as a condition of employment. The instant petition directly presents this important question.

Duffield's remaining points are mere smoke intended to give the appearance of a case turning on special or unique circumstances. Duffield's challenges to the adequacy of the arbitration forum, which were not addressed by the Ninth Circuit (but which were rejected by the district court), simply do not weigh among the considerations affecting the granting of the writ. Nor would this case — which has already been ordered to arbitration by both the district court

and the Ninth Circuit — be mooted by any subsequent change in the arbitration rules of the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD"). For the reasons set forth below and in the petition, the writ should be granted.

I.

THE CONFLICT AMONG THE CIRCUITS AND OTHER STATE AND FEDERAL COURTS IS SOLIDIFYING, NOT RESOLVING.

Duffield concedes, as she must, a square conflict among the circuit courts as to the arbitrability of Title VII claims pursuant to individual agreements entered into as a condition of employment.[1] Duffield's assertion that the conflict "may well resolve itself" has no basis in logic or fact. If anything, the split has become more entrenched since Robertson, Stephens filed its petition. Duffield acknowledges a square conflict between the decision below and the decision of the Third Circuit in *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998). Duffield contends, however, that only *Seus* is in conflict because only *Seus* addressed the issue of the interpretation of Section 118 of the Civil Rights Act of 1991, which "encouraged" arbitration of Title VII claims. Opp. Brief at 21 n.14. In fact, Robertson, Stephens's petition cited, in addition to *Seus*, decisions from the Fourth,

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1. Duffield's opposition does not even address the issue of the arbitrability of state statutory discrimination claims. The decision below found that Congress intended to prohibit arbitration of both federal and state statutory discrimination claims. The Ninth Circuit's treatment of the state law claims is as significant a burden on arbitration under the FAA as the ruling regarding Title VII claims. *See* Pet. at 28.

Seventh, and Eighth circuits, two state high court decisions, and one district court decision — all of which analyzed Section 118 and reached conclusions contrary to the decision of the Ninth Circuit. *See* Pet. at 10-11 & n.4. Moreover, the conflict is equally problematic with regard to decisions of the District of Columbia and Fifth circuits, which, while not specifically discussing Section 118, did enforce agreements to arbitrate Title VII claims arising after the 1991 Civil Rights Act. *See id.*

Duffield cannot persuasively support the contention that more litigation in other circuits would aid this Court's resolution of the question presented in the petition. The litigants and courts in the decision below, in *Seus* and in the other cases cited in the petition, have already identified all of the statutory language, legislative history, and key arguments at issue. Further percolation of this issue in the circuit courts would not materially assist this Court in interpreting Section 118 and assessing its impact, if any, on the enforceability under the FAA of arbitration agreements entered into as a condition of employment.

In the meantime, federal and state courts continue to issue cases which conflict with the decision below. Since the petition was filed, a federal court in Ohio observed that the conflict among the circuits regarding Section 118 "continues unabated." *O'Hara v. Mt. Vernon Bd. of Educ.*, __ F. Supp. 2d __, No. C2-95-554, 1998 WL 547068 (S.D. Ohio Aug. 26, 1998). A Texas federal court rejected a challenge to a Title VII arbitration award in a case in which the plaintiff relied on the Ninth Circuit decision in *Duffield*. *See Thomas v. Bear, Stearns & Co., Inc.*, No. CIV. A.3:93-CV-1970D, 1998 WL 684232 (N.D. Tex. Sept. 25, 1998). The district court in *Thomas* based its ruling on the Fifth Circuit's recent decision in *Mouton v. Metropolitan Life*

Insurance Co., 147 F.3d 453 (5th Cir. 1998), one of the cases which Duffield erroneously dismisses as a false conflict. In the state system, a California appellate court held that state discrimination claims are arbitrable and expressly rejected the Ninth Circuit's decision below. *See 24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 78 Cal. Rptr. 2d 533 (Sept. 28, 1998).[2] In both the federal and state courts, the conflict shows no sign that it will somehow resolve itself without the intervention of this Court.

Duffield's contention that the question raised here – the enforceability of individual agreements to arbitrate Title VII claims — may be resolved when this Court decides *Wright v. Universal Maritime Services Corp.*, No. 97-889 (argued Oct. 7, 1998), is far-fetched. Unlike the individual agreement to arbitrate under the FAA in this case, *Wright* involves arbitration under a collective bargaining agreement governed by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq*. The question under the FAA of the arbitrability of Title VII and related state statutory claims arising after the Civil Rights Act of 1991 pursuant to individual arbitration agreements entered into as a condition of employment cannot be decided based on the facts of *Wright*.

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2. The split between California and Ninth Circuit decisions on the arbitrability of statutory discrimination claims is troubling because it promotes forum shopping and the filing of state claims in already congested federal courts within the Ninth Circuit.

II.

THE DECISION BELOW AFFECTS EVERY SECTOR OF THE ECONOMY, NOT JUST THE SECURITIES INDUSTRY.

Contrary to Duffield's assertions in her opposition brief, the holding below is not limited to the securities industry. The court below stated that the legislative history of Section 118

> makes it clear that there is no need to hypothesize over whether Congress intended to include *Gilmer* within its definition of what [arbitration] was "authorized by law." It is evident from the legislative history that the answer to that inquiry is a resounding "no." Congress in no way intended to incorporate *Gilmer*'s holding into Title VII, or to authorize compulsory arbitration of Title VII claims. In fact, its clearly expressed intent was precisely the opposite.

Pet. App. at 35a. In applying its interpretation of Section 118 to Duffield's arbitration agreement, the Ninth Circuit stated the rule broadly:

> Form U-4 compels precisely what Congress intended to prohibit in the 1991 Act: mandatory requirements under which prospective employees agree as a condition of employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead.

Id. at 46a.

Duffield's own attorneys, on other occasions, have trumpeted the broad effect of the Ninth Circuit's ruling. Michael Rubin, counsel of record for Duffield, told a San Francisco legal newspaper:

> This strikes down arbitration not just in the securities industry, but in every single workplace in America.

J. Ward, "9th Circuit Guts Mandatory ADR," *The Recorder* at 1 (May 11, 1998).

Duffield suggests that the "unique" context of securities industry arbitration would prevent the court from reaching the question decided below. Opp. at 10. This Court need not address the specific challenges to securities industry arbitration which the Ninth Circuit did not reach below and which are not the subject of a circuit split. This Court's *certiorari* process is expressly designed to limit the questions considered by the Court. Rule 14.1(a) of this Court. Thus, this Court is free to reverse the Ninth Circuit by answering the question presented, and remand for consideration below Duffield's arguments that relate solely to securities industry arbitration. The last time this Court addressed individual agreements to arbitrate discrimination claims, it did so in the context of NYSE arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (NYSE arbitration procedures provide fair and adequate forum for the resolution of statutory discrimination claim). The Court could effectively do so again in this case.

III.

THIS CASE WILL NOT BE MOOTED EVEN IF THE PROPOSED NYSE RULE CHANGE IS ADOPTED.

Duffield argues that the proposed change to NYSE Rule 347 will moot this case by preventing an NYSE arbitration from going forward. Even if the rule change were to become effective (which has not so far occurred), this argument fails for several reasons. First, contrary to Duffield's suggestion, the rule change would not apply to pending cases already filed in court and ordered to arbitration under the present rule.[3] *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (applying the arbitration rule in effect at the time the lawsuit was filed); *see also* NYSE Rule 603 (time limitation for initiating arbitration does not apply to any case directed to arbitration by a court of competent jurisdiction).

Second, under the existing Rule 347, Robertson, Stephens has the ability to initiate an arbitration proceeding, and would do so if necessary to preserve the arbitral forum for all of Duffield's claims. *See* NYSE Rule 347 (any employment-related controversy between a registered representative and member of the NYSE "shall be settled by arbitration, *at the instance of any such party*" (emphasis added)). Even under Duffield's erroneous interpretation, she must concede that once the arbitration is initiated, it would not be affected by the subsequent proposed change to Rule 347.

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3. The district court ordered arbitration of all of Duffield's claims, including Title VII and state Fair Employment and Housing Act claims. Pet. App. at 87a. The Ninth Circuit affirmed the order compelling arbitration *except* as to Title VII and FEHA claims. *Id.* at 56a.

Finally, this case will not become moot regardless of the availability of the NYSE forum for statutory discrimination claims. Duffield agreed to arbitrate her employment claims under the arbitration rules of the NASD. She also separately agreed in writing to arbitrate under the Robertson, Stephens arbitration procedures all disputes "arising out of or relating to the termination of any employee's employment . . . including . . . alleged violations of federal, state and/or local statutes." (CR 78, SER 604-05). These separate arbitration agreements were alternative bases for Robertson, Stephens' motion to compel arbitration and stay litigation and its opposition to Duffield's motion for partial summary judgment on her claim that she was not required to arbitrate her employment dispute with Robertson, Stephens.[4]

In summary, each of Duffield's arguments against granting the writ of *certiorari* collapses upon examination. Contrary to her contentions, the pending *Wright* case and potential changes in securities industry arbitration cannot affect the Court's ability to resolve the question presented if *certiorari* is granted. Duffield concedes that this is an important issue on which there is a square conflict among the circuit courts. As revealed by her counsel's own candid comments elsewhere, the decision below affects arbitration in "every single workplace in America." The conflict on this important issue is not tolerable and will not be resolved absent intervention of this Court.

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4. During her career, Duffield has signed at least five separate agreements to arbitrate employment claims. *See* Pet. at 3-4. In the Form U-4 she signed at the commencement of her employment with Robertson, Stephens, she agreed to arbitrate employment claims under the rules of the NYSE, NASD, and the American Stock Exchange ("ASE"). (CR 33, ER Tab G). Unlike the NYSE and the NASD, the ASE has not proposed to modify its arbitration rules.

CONCLUSION

For the reasons set forth above and in the petition, the Court should issue the writ of *certiorari*.

Respectfully submitted,

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